ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA
NO. DA 09-0322

PLAINS GRAINS LIMITED PARTNERSHIP, a Montana limited partnership; PLAINS GRAINS, INC., a Montana corporation; ROBERT E. LASSILA and EARLYNE A. LASSILA; KEVIN D. LASSILA and STEFFANI J. LASSILA; KERRY ANN (LASSILA) FRASER; DARYL E. LASSILA and LINDA K. LASSILA; DOROTHY LASSILA; DAN LASSILA; NANCY LASSILA BIRTWISTLE; CHRISTOPHER LASSILA; JOSEPH W. KANTOLA and MYRNA R. KANTOLA; KENT HOLTZ; HOLTZ FARMS; INC., a Montana corporation; MEADOWLARK FARMS, a Montana partnership; JON C. KANTOROWICZ and CHARLOTTE KANTOROWICZ; JAMES FELDMAN and COURTNEY FELDMAN; DAVID P. ROEHM and CLAIRE M. ROEHM; DENNIS N. WARD and LaLONNIE WARD; JANNY KINION-MAY; C LAZY J RANCH; CHARLES BUMGARNER and KARLA BUMGARNER; CARL W. MEHMKE and MARTHA MEHMKE; WALTER MEHMKE and ROBIN MEHMKE; LOUISIANA LAND & LIVESTOCK, LLC., a limited liability corporation; GWIN FAMILY TRUST, U/A DATED SEPTEMBER 20, 1991; FORDER LAND & CATTLE CO.; WAYNE W. FORDER and DOROTHY FORDER; CONN FORDER and JEANINE FORDER; ROBERT E. VIHINEN and PENNIE VIHINEN; VIOLET VIHINEN; ROBERT E. VIHINEN, TRUSTEE OF ELMER VIHINEN TRUST; JAYBE D. FLOYD and MICHAEL E. LUCKETT, TRUSTEES OF THE JAYBE D. FLOYD LIVING TRUST; ROBERT M. COLEMAN and HELEN A. COLEMAN; GARY OWEN and KAY OWEN; RICHARD W. DOHRMAN and ADELE B. DOHRMAN; CHARLES CHRISTENSEN and YULIYA CHRISTENSEN; WALKER S. SMITH, JR. and TAMMIE LYNNE SMITH; JEROME R. THILL; and MONTANA ENVIRONMENTAL INFORMATION CENTER, a Montana nonprofit public benefit corporation,

Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF CASCADE COUNTY, the governing body of the County of Cascade, acting by and through Peggy S. Beltrone, Lance Olson and Joe Briggs,

Appellees,

and

SOUTHERN MONTANA ELECTRIC GENERATION and TRANSMISSION COOPERATIVE, INC.; the ESTATE OF DUANE L. URQUHART; MARY URQUHART; SCOTT URQUHART; and LINDA URQUHART,

Appellees/Cross-Appellants.

From the Montana Eighth Judicial District Court
Cause No. BDV-08-480
Honorable E. Wayne Phillips Presiding

APPELLANTS' RESPONSE TO SME'S SECOND MOTION TO DISMISS

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I. INTRODUCTION

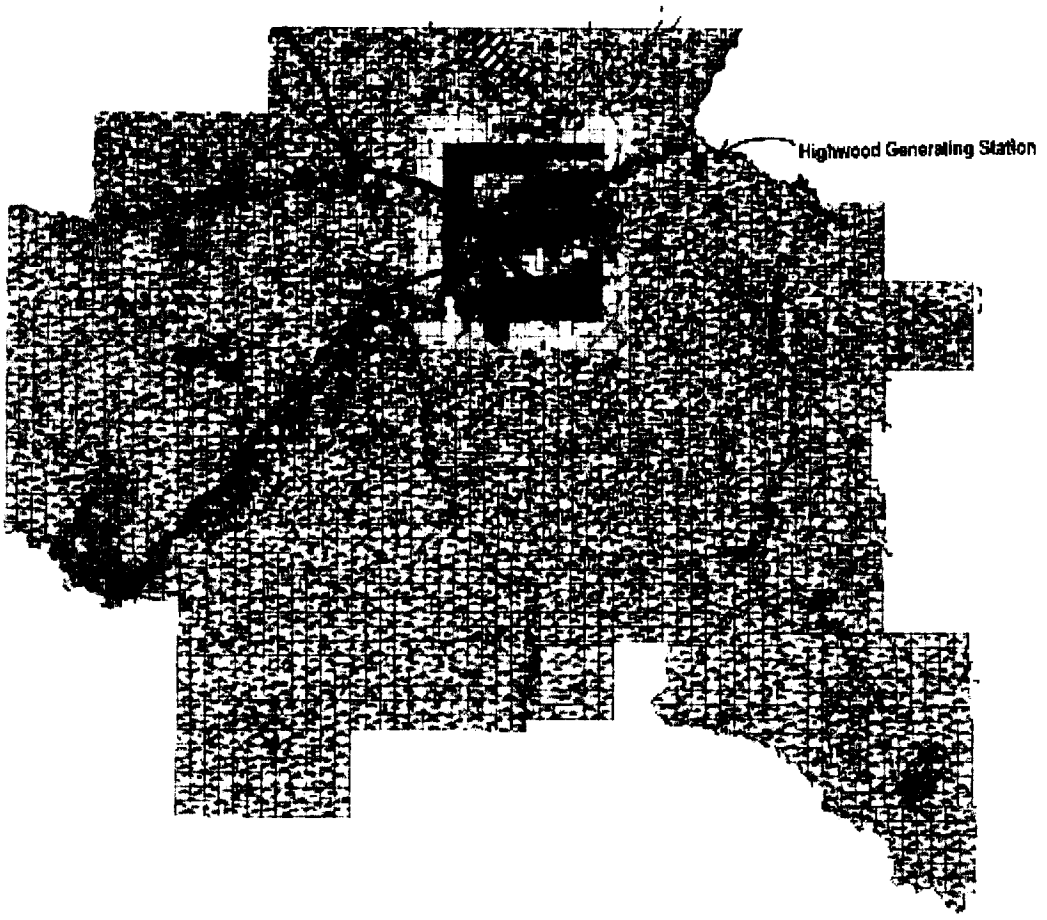
In its Second Motion to Dismiss, SME argues that, "The 2009 county-wide rezone is now final and non-appealable and the prior 2008 rezoning of the Urquhart's property at issue and this appeal is moot." (Second Motion to Dismiss at p. 4.) Throughout its brief, SME sheepishly acknowledges that the arguments presented have already been discussed in its supplemental brief filed December 18, 2009. Indeed, this filing by SME is a transparent effort to reargue the issue which this Court ordered be addressed in the parties' December 18 briefs. That issue is whether the August 25, 2009, amendments to the zoning regulations and zoning map affect the spot zoning claim asserted by Plains Grains. Simply stated, the amendments do not affect the spot zoning claim and the arguments advanced by SME are, once again, misplaced.

II. DISCUSSION

A. As a matter of fact, the 2009 zoning amendments do not affect the spot zoning claim asserted by Plains Grains.

At oral argument, the Court noted the absence of a record on the August 25 zoning amendments. Therefore, Plains Grains submitted the entire record of that proceeding (Appendix Tab W), and Anne Hedges, Program Director of MEIC, reviewed the entire record, including recordings of the hearings. (Third Affidavit of Anne Hedges, Appendix Tab V.) What the record establishes is that during the entire

amendment process, not a single reference was made to the rezoning at issue in this case. (Third Affidavit of Anne Hedges, ¶ 7; Tab V.) There was no reconsideration of the rezoning, no amendment to the rezoning — not even mention of the rezoning. (*Id.*) Thus, the 668 acres of land rezoned from Agricultural to Heavy Industrial for the purpose of constructing the Highwood Generating Station remains unchanged, literally a black island of Industrial land surrounded by a sea of green Agricultural land on the Cascade County Zoning Map — emblematic of what it is, a classic instance of illegal spot zoning.



(See Map at Tab W-2.)

Thus, the record demonstrates that the amendments to the zoning regulations and zoning map do not affect the spot zoning claim asserted by Plains Grains. In that regard, the Court will recall that the District Court found "compelling" bases in favor of Plains Grains' claim of spot zoning, but determined that the rezoning was not spot zoning on the singular (and erroneous) basis that under a special use provision in the A-2 District, the coal-fired power plant proposed by SME for the site was "already permissible in that agricultural area prior to the rezoning request." (Order at p. 25; Tab A.)

Specifically, the District Court based its conclusion on the special use exception in the A-2 District for "Commercial Wind Farms/Electrical Generation Facilities." However, the District Court's conclusion is fatally flawed by the unambiguous limitation set forth in the Cascade County Zoning Regulations which allow "Industrial Uses" **only** within an I-1 or I-2 zoning district. That regulation which defined "Industrial Uses" at the time that the Commissioners rezoned the land at issue on March 11, 2008, remains precisely the same in the amended regulations adopted August 25, 2009. In both instances, "Industrial Uses" is defined as follows:

> Uses of land which are allowed by right **or through the special permit process ONLY in the I-1 or I-2 zoning classifications**, as listed in these regulations.

(*Compare* CCZR 2.99.31, Tab I; and CCZR § 2, p. 24, Tab W-1; emphasis added.)

Likewise, the definition of "Heavy Industrial" is unchanged in the amended regulations. (*Compare* CCZR § 2.99.28, Tab I; and CCZR § 2, p. 23, Tab W-1.) The proposed use of the land for an electrical power generating complex is undeniably a Heavy Industrial use. As the Rezoning Application itself acknowledged:

> The **requested rezoning to Heavy Industrial** use is **a prerequisite** to the planned **construction and operation** of an electrical generation station, known as the **Highwood Generating Station** . . .

(Rezoning Application; Tab C, p. 1; emphasis added.)

In sum, regardless of the August 25 amendments, whether a coal-fired power plant or a gas-fired power plant, both are still Industrial Uses and "only" permitted in the I-1 or I-2 zoning classifications. Hence, the District Court's error in determining that the rezoning was not spot zoning on the singular basis of a special use permit provision in the A-2 district was, and remains, clearly erroneous.

B. As a matter of law, the 2009 zoning amendments do not render Plains Grains' appeal moot.

Again, SME relies on the case of *Country Highlands Homeowners Assn., Inc. v. Board of County Comm'rs of Flathead County*, 2008 MT 286, 345 Mont. 379, 191 P.3d 424, in arguing that the August 25 zoning amendments, and the running of the statutory appeal period, render Plains Grains' appeal moot. (Second Motion to Dismiss at pp. 5-6.) Plains Grains has previously demonstrated that the case is entirely distinguishable on its facts. (*See* Plains Grains' Supplemental Brief at pp. 9-

15.) Unlike *Country Highlands*, the particular rezoning at issue in this appeal still has effect. It has not been "superseded" by the August 25 amendments. In fact, the record of the August 25 amendments demonstrates that there was no reconsideration of or amendment to the rezoning at issue. And unlike *Country Highlands*, the 2006 Cascade County Growth Policy has not been superseded by a new Growth Policy.

Moreover, the *Country Highlands*' Court noted that, "Country Highlands does not argue the exception to mootness." *Country Highlands*, ¶ 17. The Court need not reach the issue of whether the exception applies here since the record demonstrates that the amendments to the zoning regulations and zoning map do not affect Plains Grains' spot zoning claim. Nevertheless, in the event that the Court addresses the issue of mootness in regards to the August 25 amendments, then the "capable of repetition yet avoids review" exception to mootness applies. Plains Grains has previously explicated the application of the exception, and so will not repeat it here. (See Plains Grains' Supplemental Brief at pp. 15-19.)

In sum, the effort by SME to use inapposite zoning amendments to vitiate the legitimate efforts of Montana citizens to challenge the legality of a legislative act of their local governing body is not only an attempt to allow a demonstrably illegal action to evade review, but "threatens to undermine the confidence of these concerned citizens in our system of justice, and challenges the financial resources which they are

willing and able to dedicate to this process." (Third Affidavit of Anne Hedges, ¶ 14.) The Court should rule forthwith on the merits.

III. CONCLUSION

Mootness is intended to get rid of cases that are dead. The controversy regarding the validity of the rezoning that gives rise to this case continues. This case is not moot. Nevertheless, SME argues that Plains Grains was required to file yet a third lawsuit to challenge the rezoning at issue because of the August 25, 2009, zoning amendments. As demonstrated, the record establishes that the amendments do not affect the spot zoning claim. Moreover, if the Court even addresses the issue of mootness in regards to the August 25 amendments, then the exception to mootness clearly applies and the Court should rule on the merits of the appeal.

Finally, time is of the essence to all parties. In the interests of justice Plains Grains has previously requested that the Court determine this appeal in an expeditious manner.

Respectfully submitted this 8th day of April, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that the foregoing response is produced in proportionately spaced Times New Roman of not less than 14 point type, utilizes double line spacing, except in footnotes, headings and extended quotations, which are single spaced, and the word count calculated by WordPerfect 12 for Windows does not exceed 1,250 words, excluding certificate of service and certificate of compliance.

Dated this 8th day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2010, a true and correct copy of the foregoing document has been served via U.S. First Class Mail upon the following:

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